Supreme Court of the United States.

OCTOBER TERM, 1972.

No. 72-1679.

GRINNELL CORPORATION,
CROSS-PETITIONER,

v.

MARY C. HACKETT, DIRECTOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY OF THE STATE OF RHODE ISLAND, AND JOHN J. AFFLECK, DIRECTOR OF THE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES OF THE STATE OF RHODE ISLAND, PETITIONERS.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Thee cross-petitioner, Grinnell Corporation, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the Court of Appeals is reported in 475 F. 2d 449 and that of the United States District Court for the District of Rhode Island is reported in 344 F. Supp. 749 (D. R.I. 1972). Both opinions appear as appendices to the petition for a writ of certiorari.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 15, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether a Rhode Island statute which provides for payment of unemployment compensation benefits to strikers as such, irrespective of need, is, *per se*, an impermissible intrusion on the federal policy of free collective bargaining.

2. Whether the payment pursuant to such statute of unemployment benefits to substantially all of plaintiff's striking employees, totaling 72 per cent of take-home pay, is an impermissible intrusion into an area preempted by Congress.

3. Whether the court below is correct when, on remand, it imposes on plaintiff the burden of presenting a macrocosmic empirical conglomerate of statistical and subjective evidence to prove infringement upon federal labor policy and then, in addition, of proving that the state interest is less substantial than the federal interest.

Statutory Provisions Involved.

GENERAL LAWS OF RHODE ISLAND (1956), § 28-44-16.

"*Labor disputes.* — An individual shall not be entitled to benefits except for unemployment which continues subsequent to six (6) weeks in addition to his waiting period, if he became unemployed because of a strike or other industrial controversy in the establish-

ment in which he was employed; provided, that this section shall not apply if it is shown to the satisfaction of the director that the claimant is not a member of the organization or group responsible for the stoppage of work, and is not participating in or financing or in any way directly interested in the labor dispute which caused the stoppage of work."

Statement of the Case.

Cross-petitioner adopts the petitioner's "Statement of Facts and Travel of the Case" with the following addition.

The record before the District Court included uncontradicted evidence that upon expiration of the statutory waiting period all or virtually all of cross-petitioner's striking employees received weekly unemployment compensation payments approximating 72 per cent of their average prestrike take-home pay.

Reasons for Granting the Cross-Petition for Writ of Certiorari.

1. The Decision of the First Circuit Illustrates the Confusion and Inconsistency among the State and Federal Courts in Approaching the Preemption Question Inherent in State Subsidies to One or the Other Parties to a Labor Dispute.

Over the past several years an increasing number of cases have challenged the payment of public assistance benefits to strikers as being inconsistent with the national labor policy of free collective bargaining. See, *e.g.*, *ITT* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970), cert den. 402 U.S. 933 (1971); *Lascaris* v. *Wyman*, 31 N.Y. 2d 386, 82 LRRM 2634 (1972); *Dow Chemical* v. *Taylor*, F. Supp. , 81 LRRM 2872 (E.D. Mich. 1972). See also *Almacs, Inc.* v. *Hackett*,

312 F. Supp. 964 (D. R.I. 1970), and *ITT* v. *Carter*, C. A. No. 3770 (D. R.I. 1967), both involving the same Rhode Island unemployment compensation statute as here and both having been discontinued without disposition on appeal because the underlying strikes were settled.

These challenges have increased as the use of public assistance by unions to support strikes has increased. This use has attained to the level of union policy and, indeed, has become endemic. Yet, as the decision below well illustrates, the federal and state courts are so confused and inconsistent in their approach to the problem that the need for this Court to define the scope of preemption in this area has become critical.

Beyond question, Congress has seen fit to regulate labor relations " to the full extent of its constitutional power under the Commerce clauses." *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391 (1951); *H. K. Porter Co., Inc.* v. *NLRB*, 397 U.S. 99, 108 (1970). Beyond question too, free collective bargaining is the linchpin of the congressional scheme. In turn, free collective bargaining is predicated on and presupposes the presence of economic weapons such as the strike and the lockout as the catalyst to bring about agreement. Because of pain or the threat of pain caused by these weapons, the parties will retreat from intransigent positions, search for compromise and ultimately reach a settlement.

This case, like *Minter, Lascaris, Dow* and the other cases, *supra*, questions the extent to which state legislation may alter the usual economic consequences suffered by the parties to a work stoppage. It raises the preemption problem. However, preemption cases on the whole have dealt with state laws purporting to *regulate* the activities of the parties to the collective bargaining process.

This regulation has tended to fall into one of two categories. Where, on the one hand, the activity sought to

be regulated is arguably protected by section 7 or prohibited by section 8 of the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, the preemption question is resolved by reference to *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

Where, on the other hand, the activity sought to be regulated is neither arguably protected nor prohibited by the federal act, the relevant inquiry is, as enunciated in *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Lester Morton Trucking Co.*, 377 U.S. 252 (1964), ". . . whether the application of state law . . . would operate to frustrate the purpose of the federal legislation . . ." (at p. 258), by, for example, upsetting the balance of power between labor and management.

Where unemployment compensation or welfare is encountered, however, the courts seem to feel that the state legislation does not constitute "regulation" in the sense in which preemption cases use the term. This may explain the difficulty the courts are experiencing with the unemployment and welfare cases. (Of course, a state subsidy to one party in a labor dispute could, without offending reason, be deemed "regulation" of at least the incidents of a dispute; as yet though, to our knowledge, no court has dealt with this argument.)

The instant case illustrates this difficulty. The Court of Appeals for the First Circuit considers that the case is not governed by *Garmon* or by *Morton*, the two pronouncements by this Court in the field but, rather, by its own prior decision in *ITT* v. *Minter, supra*. It reverses the District Court only insofar as, in its view, that court misread *Minter* on the issue of justiciability.

The two cases, however, the case at bar and *Minter*, differ in form and substance. In *Minter*, the Circuit Court upheld the denial of a preliminary injunction against welfare

payments to strikers. The record indicated that an indeterminate number of strikers received benefits in an indeterminate amount pursuant to a statute having no specific reference to strikes or strikers and premising payments on need.

Here, by way of contrast to *Minter*, (a) the statute in question specifically grants to strikers as strikers the right to state aid, (b) the amount of aid and the number of recipients is not in the least conjectural, and (c) the benefits are paid without regard to need. Whether or not *Minter* is good law on welfare payments, it is clearly not applicable to the instant case.

In summary then, it may be argued that this case is governed by *Garmon, supra*, although its facts viewed conventionally do not easily adapt to the so-called *Garmon* rule. If not, the case would certainly seem to be governed by *Morton, supra*. Perhaps there is still another alternative appropriate for the strike subsidy line of cases, *e.g.*, a test such as that proposed by Professor Cox in Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972).

2. Although in Law the Federal Interest is Paramount and by Logic Substantial State Subsidies have an Impact on Free Collective Bargaining, the Court Below, Nonetheless, Places on the Plaintiff the Burden of Proving Both Infringement of the Federal Interest and Lack of State Interest and then, to Boot, Imposes a Test that, in Effect, Prejudges the Issue.

The problem of preemption is one of seeing where and to what extent state interests can coexist with the federal interest. However, the federal, not the state, interest is paramount. This the court below twists 180 degrees by imposing the burden of proof on the plaintiff.

Then, and more grievous still, for a test the court requires a mountain of statistical and subjective evidence. This test is so radical and severe that for practical purposes it may well prejudge the case. Whether by calling for data that does not exist or by its sheer stringency, or both, the test might constrain any court to say (or, depending on its presuppositions, readily let it say) that the burden had not been carried.

Assuredly, this approach turns the accepted hierarchy of federal and state interest upside down. It and *Minter*, are the only labor preemption cases imposing such a burden of proof. Worse, it really provides no tool for wide-ranging analysis at all. In the case at bar, the subsidy amounts to 72 per cent of take-home pay without regard to need. But what about the case where it amounts to one per cent of take-home pay? Or what about the case where from day one of the strike it amounts to 100 per cent of take-home pay? To require a Himalaya of evidence in such cases would make no sense at all. Yet, the court below would require exactly that.

Finally, and at the very least, sound judicial administration suggests clarification of the guidelines by this Court. The evidentiary burden imposed by the Court of Appeals presages a prolonged trial, a certain appeal to the First Circuit, and a further petition to this Court. It would be one thing if this burden were congruent with the prior decisions of this Court. It is not, however. Consequently, unless a writ is granted, the parties and the court will engage in an exercise as futile as it is onerous.

Conclusion.

For a final and encapsulating perspective we can do no better than return to the hypothetical case mentioned ear-

lier—the payment by the state to strikers as strikers, without regard to need, of 100 per cent of their take-home pay from the first day of the work stoppage until the last. No one would seriously argue that one theory of preemption or another would be found to prohibit such payments and to do so without an elaborate evidentiary ritual.

The instant case differs in degree only, not in kind from the hypothetical case. Whether, as we believe, this Court has already provided the theory to safeguard federal labor policy or whether the lower courts correctly perceive a gap in preemption theory is in a sense immaterial. The facts show a spreading use of public assistance to finance strikers and a confusion in and hesitancy by the lower courts in approaching and, hence, in correcting this distortion of the bargaining process. These facts together with the overweening importance of the question and the magnitude of the error below make the subject ripe for review by this Court. This case provides the ideal vehicle.

The cross-petition for certiorari should be granted.

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Respondents.

JOINT MEMORANDUM IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

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General Electric Company v. Callahan, 295 F. 2d 60 (1st Cir. 1960) 7

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Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955) .. 8

STATUTES CITED.

Food Stamp Act, 7 U. S. C. 8

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National Labor Relations Act, 29 U. S. C. § 141 et. seq. .. 3, 8

AUTHORITIES CITED.

American Bar Association, Section of Labor Relations Law, 1972 Committee Reports, Vol. II, p. 293 9

Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972) 4, 6

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Thieblot and Cowin, Welfare and Strikes, University of Pennsylvania Press (Phil. 1972), p. 217 4

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Respondents.

JOINT MEMORANDUM IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

Respondents,[1] The Chamber of Commerce of the United States of America and the Greater Providence Chamber of Commerce (hereafter collectively the "Chambers"), urge this

1. The Chambers, as appellants below, are respondents herein under Rule 21(4) of this Court. The Chambers have been permitted until August 15, 1973, to file a response to the cross-petitions for writs of certiorari filed by the State of Rhode Island and Grinnell Corporation.

Court to grant both of the captioned petitions for writs of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

QUESTIONS PRESENTED.

1. Whether, where state and federal legislation do not appear on their face to regulate the same activity, federal preemption may be found only where the state legislation palpably infringes upon federal policy *and* the federal interest is balanced against and found more compelling than the state interest?

2. What is the correct standard for determining whether the payment of a substantial state subsidy to striking employees obstructs the federal scheme of free collective bargaining?

SUPPLEMENTAL STATEMENT OF THE CASE.

In May, 1972, the Grinnell Corporation, then undergoing a strike by its employees affiliated with the United Steelworkers of America, filed suit in federal district court for a declaratory judgment and to enjoin the State[2] from continuing to pay unemployment compensation benefits to over 90% of its striking employees. The benefits, equal on average to over 70% of the employees' pre-strike take-home pay, were provided, pursuant to a uniform state policy, after the employees had met the requisite statutory waiting period.[3]

Recognizing the significant effect of such payments upon their memberships in the State of Rhode Island, the Chambers

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2. Both Petitioners, Mary C. Hackett and John J. Affleck, are officers of the State of Rhode Island, alleged to be acting pursuant to the laws of Rhode Island, and will be referred to herein as the "State."

3. See G. L. R. I. (1956), §§ 28-44-1 through 28-44-61, as amended.

intervened pursuant to Rule 24, F.R.C.P.[4] The Chambers asserted that the State's policy of providing strikers with substantial subsidies, in the form of unemployment compensation, prolongs strikes and/or increases the cost of collective bargaining agreements to employers, and that the effect of such payments was antithetical to the State's interests. On June 16, 1972, the District Court, after holding an evidentiary hearing on a motion for a preliminary injunction, sustained a motion to dismiss filed by the State. The court, refusing to make findings of fact as to the effect of the disputed policies upon collective bargaining, held: (1) that the payment of unemployment compensation benefits to strikers is an issue "appropriate for resolution by Congress, not by this Court"; and (2) that, despite Grinnell's and the Chambers' allegations of, as well as testimony to demonstrate, a frustration of federal policy, such state action was not prohibited by the Supremacy Clause because "[t]he State's interest is so substantial" that, as a matter of law, it cannot be precluded from granting strikers the disputed subsidies.

On appeal, the Court of Appeals for the First Circuit was "unable to affirm the District Court on either ground." Rhode Island's Pet., p. 17. The First Circuit, instead found the "preemption issue is justiciable;" however, rather than reversing that Court, the Court of Appeals remanded subject to an admittedly "unusual . . . insistence on an appropriate and detailed evidentiary basis . . .". Rhode Island's Pet., p. 34. The Court refused to conclude that collective bargaining is affected by the availability of the substantial payments to strikers and denigrated expert testimony that the payments of, or availability of, state

4. The U. S. Chamber, with a direct business membership in excess of 38,000 employers, and 3,700 state and local chambers of commerce, with an underlying membership of 5 million businesses and individuals, is the largest association of business and professional organizations in the United States. Similarly the Providence Chamber, an affiliate of the U. S. Chamber, is the largest association of employers in Rhode Island. Many are subject to the National Labor Relations Act, 29 U. S. C. § 141 *et seq.*

subsidies will "increase the propensity of a union to undertake strikes, . . . and the probability that they will be longer, costlier or both."[5] The First Circuit required, instead, that a complex " 'catalogue of data relevant to a macrocosmic weighing' " was required to be presented by the plaintiff to show a substantial frustration of federal policy. And, even assuming such frustration, a variety of "compelling state interests" (Rhode Island's Pet., p. 30), *e.g.*, economic hardship, local commercial stagnation, would validly justify such an instrusion on federal labor policy. The Court of Appeals recognized "the unusual nature" of its proposed means for deciding "the issue of federal policy." Rhode Island's Pet., p. 34. It concluded, however, that only in this manner could the "governing law of preemption" be applied to the circumstances of this case.

REASONS FOR GRANTING THE PETITIONS FOR WRITS OF CERTIORARI.

A. This Case Presents a Recurrent Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The recurring labor preemption problem of the past was articulating a rule from which the lower federal and state courts could determine the limits of their jurisdiction when dealing with labor related matters. See *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) and *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971). The open issue which must now be determined—and an issue of similar magnitude[6]—is the permissible extent of the States' legislative pow-

5. Thieblot and Cowin, *Welfare and Strikes*, University of Pennsylvania Press (Phil. 1972), p. 217—Plaintiff's Exhibit 1 below. See also Dr. Thieblot's testimony that:

> "We find that there is something of a movement in the direction of the union eliminating strike benefits to workers who are going on welfare, and this in our view is tantamount to saying that the . . . public treasury is to some extent a major strike fund." App. Tr. 70, below.

6. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337-1339 (1972): "From 1945 to 1960 no aspect of labor-

er, albeit perhaps directed at non-labor objectives, to modify the collective bargaining process. Admittedly, even prior to *Garmon*, this Court declared that:

> For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of Federal policy as if the State were to declare picketing free for purposes or by methods which the federal Act prohibits. *Garner* v. *Teamsters Union*, 346 U. S. 485, 500 (1953).

It is now necessary to determine specifically (1) what test must be satisfied to demonstrate such an impingement in the "area of labor combat;" and (2) which State interests, where such a test is satisfied, should be permitted to prevail and leave the "national system for the implementation of this country's labor policies . . . dependent on State law." *Nash* v. *Florida Industrial Commission*, 389 U. S. 235, 239 (1967). State subsidies to strikers, who would not otherwise receive such benefits but for their decision to strike, the issue here, typifies that problem and is a recurring subject of judicial controversy.[7] As such, the pending petitions are appropriate vehicles for this Court's formulation of a preemption standard to protect the uniformity of the national labor policy. Cf., *e.g.*, *McDonnell Douglas Corp.* v. *Green*, 93 S. Ct. 1817 (1973), where this Court de-

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management relations law gave rise to as much litigation and diversity of judicial opinion as the problems of fitting the basic federal labor legislation—the National Labor Relations Act, the Labor Management Relations Act and the Labor-Management Reporting and Disclosure Act—into the surrounding legal system. . . . Today the wind carries scent of change—or at least of reexamination. . . . The occasion seems ripe, therefore, for a review of the development of, and basic issues in, the law pertaining to federal occupation of the field of labor disputes.

7. See, e.g., *Super Tire Engineering Company* v. *McCorkle*, 469 F. 2d 911 (3rd Cir. 1972), *pet. for cert. pend.* No. 72-1554; *Lascaris* v. *Wyman*, ... N. Y. ..... (N. Y. Ct. of App. 1973), *pet. for cert. pend.* No. 72-1726; *The Dow Chemical Company* v. *Taylor*, ... F. Supp. ...., 57 F. R. D. 105 (D. C. E. D. Mich. *pend.*); *Francis* v. *Davidson*, 340 F. Supp. 351 (D. C. Md. 1972), *aff'd. per curiam* 404 U. S. 904 (1972); *I. T. T.* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970) *cert. den.* 402 U. S. 933, *pet. for reh. den.* 404 U. S. 824 (1971); *Russo* v. *Kirby*, 453 F. 2d 548 (2d Cir. 1971).

fined, in a similar procedural situation the applicable rules that should prevail in the retrial of a suit under Title VII of the 1964 Civil Rights Act. A formulation of the appropriate pre-emption test to govern the retrial of this case is equally necessary.

B. The First Circuit Has Misconstrued the "Governing Law of Preemption".

The First Circuit has, through the novel preemption approach utilized here, left the determination of the supremacy of federal policy largely dependent upon the financial resources of a plaintiff. This view severely distorts the important and recurrent area of federal preemption[8] and miscontrues the decisions of this Court.

The Court has heretofore required that, for a state "[t]o restrict either the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283 (1959)], or the forms of pressure which are permissible [see *Teamsters, Local 20* v. *Morton*, 377 U. S. 252 (1964)] tips the scale towards management or union"[9] without regard to the state's objective, and is, therefore, impermissible. In neither situation, however, was any empirical evidence considered, let alone the "macrocosmic" and "complex" record required in this case by the First Circuit. In *Morton*, for instance, where this Court invalidated a state law even though the particular conduct it regulated was not arguably

8. Federal preemption cases engender considerable controversy and frequently necessitate review by this Court. See, e.g., from this Court's last term, *New York State Dept of Soc. Services* v. *Dublino*, ... U. S. ...., 41 U. S. L. W. 4925 (June 21, 1973); *Burbank* v. *Lockheed Air Terminal, Inc.*, ... U. S. ...., 41 U. S. L. W. 4600 (May 14, 1973). *U. S.* v. *Little Lake Misere Land Co.*, 453 F. 2d 360 (5th Cir. 1971), *cert. granted*, ... U. S. ...., 41 U. S. L. W. 3183 (Oct. 10, 1972); *Goldstein* v. *California, cert. granted*, ... U. S. ...., 40 U. S. L. W. 3568 (May 30, 1972). If new rules are to be formulated in this area, accordingly, they should be made by this Court and not a lower tribunal.

9. Cox, *op. cit.*, p. 1353.

proscribed or protected by federal law, the plaintiff was not required to demonstrate on any "macrocosmic" standard that its activities were an integral component in the bargaining process. This Court, indeed, has inferred, without evidence, that certain restraints have a "direct tendency to frustrate" federal policy and that financial pressure influences human conduct. *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967). Accord: *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 398; 208 N. E. 2d 516, 524 (1965). *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 654 (Del. 1967).[10] It is precisely that inference, however, which the court below refused to draw. The critical determinant now, accordingly, is the sheer practical and financial burdens of satisfying an empirical test: absent a plaintiff capable of incurring this burden the states are free to intrude substantially into the federal scheme. Such a radical restructuring of the sensitive area of state-federal relations warrants consideration by this Court. See *Perez* v. *Campbell*, 402 U. S. 637 (1971).

C. The Decision Below Threatens to Fragment the Cornerstone of Federal Labor Policy: the Collective Bargaining Process.

Notwithstanding the appropriate test to determine whether there is an obstruction to federal labor policy, to permit the amorphous variety of state interests considered by the First Circuit to prevail would open the collective bargaining process to frequent, and varying, intrusions by the States. The federal scheme provides for a "brute contest of economic power" (*N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. 477, 489 (1960)) which, it is submitted, Congress only can modify.

10. See, also the various cases in which publicity by state boards of conciliation has been held to be an impermissible intrusion, again without empirical evidence, upon the federally protected process of free collective bargaining. *General Electric Company* v. *Callahan*, 295 F. 2d 60 (1st Cir., 1960); *Oil Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1966).

See, *e.g.*, the Food Stamp Act, 7 U. S. C. 2014(c).[11] Although the collective bargaining process has variegated, disruptive social side-effects, including short term economic hardships, Congress has nevertheless concluded that the "free opportunity for negotiation . . . is likely to promote industrial peace" (*N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937)) and the social welfare. See 29 U. S. C. §§ 141, 151. Accordingly, absent violence, which strikes at the very social order itself, such difficulties are insufficient to justify permitting State by State variations, under the guise of exercising a police power, in the balance struck by Congress.[12] See, *e.g.*, *Motor Coach Employees* v. *Missouri*, 374 U. S. 74, 80-81 (1963) where the use of "emergency legislation", passed "to protect the public from threatened breakdowns in vital community services", was prohibited. See also, *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648 (Del. 1967). The

11. See the most recent Congressional debates in the disbursement of food stamps to strikers, Vol. 119, Cong. Rec. H. 6322-6334 (July 19, 1973, daily ed.), in which Congress expressly considered all aspects of the question. No such Congressional consideration has ever been afforded the payment by the states of substantially higher unemployment compensation benefits. Here the benefits amounted to 72% of the strikers take-home pay.

12. Indeed in the instant case the fact that forty-eight states expressly exclude strikers from receiving unemployment compensation benefits is an impressive indication that the current Rhode Island policy sacrifices the general welfare in favor of the unions' welfare. Moreover, notwithstanding the real state interest, once it has been shown that the statute "stands as an obstacle to the full effectiveness of a federal statute . . ." (*The Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U. S. 714, 722 (1963)), or "clashes" directly or indirectly with the "objectives" of federal policy (*Sears, Roebuck and Co.* v. *Stiffel Co.*, 376 U. S. 225, 231 (1964)), the interference by the state is prohibited. Neither the similarity nor difference between the objectives of state and federal law (*Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 141-142 (1962); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955)) nor the "relative importance to the State of its own law is . . . material." *Free* v. *Bland*, 369 U. S. 663, 666 (1962). In sum, it does not matter "whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959).

First Circuit has, however, invited such variation in the national labor scheme. Such an invitation is a matter only for this Court.[13]

13. As the Committee on State Labor Law of the Section of Labor Relations Law of the American Bar Association stated in its 1972 Report: "The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion. (footnotes omitted)." American Bar Association, Section of Labor Relations Law, 1972 Committee Reports, Vol. II, pp. 293-301.

CONCLUSION.

For each of the foregoing reasons the Chambers respectfully request that this Court grant both pending petitions for certiorari.

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